STATE OF MICHIGAN
IN THE SUPREME COURT

DR. LOWELL FISHER, an Individual, Plaintiff-Appellant, vs. W.A. FOOTE MEMORIAL HOSPITAL, INC., Defendant-Appellee.	Supreme Court No. 126333 Court of Appeals No: 244678 Jackson County Circuit Court No: 97-79018-CZ

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Philip Green (P14316)
Green, Green & Adams, P.C.
900 Victors Way, Suite 240
Ann Arbor, Michigan 49108
(734) 665-4036
Attorney for Plaintiff

Susan Healy Zitterman (P33392)
Karen B. Berkery (P38698)
Kitch Drutchas Wagner Denardis & Valitutti
One Woodward Avenue, Tenth Floor
Detroit, Michigan 48226
(313) 965-7905
Attorneys for W.A. Foote Memorial Hospital

Robert L. Weyhing (P23075)
Paul C. Smith (55608)
Clark Hill PLC
500 Woodward Avenue, Suite 3500
Detroit, Michigan 48226-3435
(313) 965-8300
Attorneys for *amicus curiae* Michigan Osteopathic Association, American College of Osteopathic Surgeons, and American Osteopathic Association

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AMICUS CURIAE BRIEF OF AMERICAN OSTEOPATHIC ASSOCIATION, MICHIGAN OSTEOPATHIC ASSOCIATION, AMERICAN COLLEGE OF OSTEOPATHIC SURGEONS

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The trial court did not address the question whether a private cause of action exists to enforce the anti-discrimination provisions of MCL 333.21513(e).

The Court of Appeals answered "No."

Appellant answers "Yes."

Appellee answers "No."

Amicus Curiae answers "Yes."

INTEREST OF AMICUS CURIAE

Osteopathic physicians, D.O.s, like allopathic physicians, M.D.s, are fully–qualified physicians who have completed a separate, but parallel, program of medical education, residency training, board certification, and licensure. The American Osteopathic Association ("AOA"), an Illinois not-for-profit corporation, is the national professional association for osteopathic physicians and osteopathic medicine. It represents the interests of over 50,000 osteopathic physicians currently practicing in the United States.

The AOA accredits colleges of osteopathic medicine, osteopathic internship and residency programs, and healthcare facilities. Hospitals accredited by the AOA are deemed to meet substantially all of the Medicare conditions of participation for hospitals. 42 C.F.R. § 488.5. The AOA is also actively involved in the education of osteopathic physicians. The AOA's Bureau of Professional Education is recognized by the United States Secretary of Education as the nationally recognized accrediting agency for colleges of osteopathic medicine and programs leading to the degree of Doctor of Osteopathy or Doctor of Osteopathic Medicine. 65 Fed. Reg. 53277 (Sept. 1, 2000). In addition, the AOA, through its Bureau of Osteopathic Education, approves osteopathic postdoctoral education programs (*i.e.*, internships, residencies and fellowships) and its approval qualifies such programs for reimbursement of direct and indirect graduate medical education expenses by the Centers for Medicare and Medicaid Services. See 42 U.S.C. §§ 1395ww (d) and (h) and 42 C.F.R. §§ 413.86(b) and 415.152 (1). The AOA's Bureau of Osteopathic Specialists supervises a board certification program for thousands of osteopathic physicians in primary care, specialty and subspecialty disciplines through 18 autonomous osteopathic certifying boards. Finally, the AOA's Council on Continuing Medical Education accredits osteopathic continuing medical education programs.

The Michigan Osteopathic Association ("MOA"), a Michigan nonprofit corporation, was formed in 1898 as a divisional society of the AOA. Currently, MOA is one of the largest osteopathic state organizations and represents over 5,000 osteopathic physicians and students in Michigan. Nationally, it is a role model for other state societies. MOA was instrumental in the founding of Michigan State University College of Osteopathic Medicine, the first publicly supported osteopathic institution in the country. See Norman Gevitz, *The DOs: Osteopathic Medicine in America*, The Johns Hopkins University Press, (2d ed. 2004) pp 149-153. Michigan is second only to Pennsylvania in the number of actively practicing osteopathic physicians.

The American College of Osteopathic Surgeons ("ACOS"), a Missouri nonprofit corporation, was incorporated in 1927, is an organization dedicated to advancing the interests of osteopathic physicians who practice in the surgical specialties. ACOS' membership currently includes 1,810 physicians. In addition, ACOS is actively involved in establishing the institutional and curriculum requirements applicable to osteopathic (i.e., AOA-approved) residency training programs in general surgery, vascular surgery, cardiovascular surgery, neurological surgery and urological surgery.

This appeal presents an issue of significant concern to members of the AOA, MOA, and ACOS because it presents a question of first impression regarding the right to a private action to remedy discrimination in violation of MCL 333.21513(E). This statue is intended to ensure osteopathic physicians ("D.O.s") have a right of access to positions on medical staffs of licensed hospitals equal to that of allopathic physicians ("M.D.s"), a right that both the AOA and MOA have fought hard over many years to preserve. See generally, Gevitz, *supra*. The Court of Appeals decision in this case is contrary to years of precedent from this Court and eviscerates the right and ability of osteopathic physicians to protect their statutory right to be free from

discrimination in the granting of medical staff privileges. As professional associations of osteopathic physicians, the AOA, MOA, and ACOS have an especially strong shared interest in seeing that the protections against discrimination afforded by MCL 333.21513(e) are effective.

BACKGROUND OF THE FOOTE HOSPITAL LITIGATION

Plaintiff, Dr. Lowell Fisher, D.O., graduated from an AOA-accredited osteopathic medical school, successfully completed AOA-accredited internship and residency programs, and received board certification in surgery from the American Board of Osteopathic Surgery, an AOA-sponsored specialty board. After practicing as an osteopathic surgeon at Doctor's Hospital in Jackson, Michigan for over twenty years, Dr. Fisher applied for staff privileges at Defendant W.W. Foote Memorial Hospital, Inc. ("Foote Hospital").

Foote Hospital's official policy required certification by the American Board of Surgery ("ABS") as a threshold requirement for obtaining staff privileges in surgery. The ABS is a member of the American Board of Medical Specialties (the "American Boards"). American Boards are the *allopathic* (M.D.) counterparts to the AOA Specialty Boards for *osteopathic* (D.O.) physicians. Certification by one of the American Boards requires that physicians complete residency training accredited by the Accreditation Council for Graduate Medical Education ("ACGME"). The ACGME is an Illinois not for profit corporation that is controlled by its members: the American Board of Medical Specialties, the American Hospital Association, the American Medical Association, the Association of American Medical Colleges and the Council of Medical Specialty. Certification under the AOA Boards requires satisfactory completion of AOA-accredited residency training, which is comparable to ACGME-accredited residency training. As noted above, the AOA is a national association of osteopathic physicians that is recognized by the United States Secretary of Education as the accrediting agency for

schools of osteopathic medicine and by the Centers for Medicare and Medicaid Services as the accrediting body for osteopathic internships and residency programs. As a D.O., Dr. Fisher was certified as specialist in surgery by the American Osteopathic Board of Surgery ("AOBS")— the AOA Specialty Board. He was not eligible for ABS or American Boards, because he completed residency training in an AOA-accredited residency rather than an ACGME-accredited residency. Moreover, it was not until the early 1980's that ACGME training programs began to accept D.O.s at all.

Foote Hospital's policy provided that an exception to the requirement of American Board certification could be made, upon request. However, an applicant requesting a waiver of the American Board certification requirement would bear the additional burden of *proving* that his or her education, training, experience, and competence is equivalent to ACGME training and certification under the American Boards. In other words, applicants certified under the AOA-sponsored boards were required to jump through an additional hoop before being granted staff privileges at Foote Hospital. In this case, Dr. Fisher's requested a waiver under the equivalence rule, but his request was denied. The denial of his waiver request constituted a rejection of his application for staff privileges. Although Foote Hospital informed Dr. Fisher that he had the option of providing "supplemental information" to the review board, Foote Hospital made it clear that its decision was final as to Dr. Fisher's pending application and that his only "remedy" would be to "reapply for a waiver at some future point and again attempt to establish equivalency."

After Foote Hospital rejected his request for staff privileges, Dr. Fisher filed suit in the Jackson County Circuit Court, asserting that Foote Hospital's official policy of favoring the American Boards over the AOA-sponsored osteopathic boards for staffing purposes violated

MCL 333.21513(e), which specifically proscribes discrimination in hospital staffing "on the basis of licensure or registration or professional education as doctors of medicine, osteopathic medicine and surgery, or podiatry." Dr. Fisher alleged that, as a direct result of Foote Hospital's illegal and discriminatory denial of staff privileges, he lost (and continues to lose) substantial sums of money that he otherwise would have earned including being excluded from treating certain classes of patients that could only be treated at Foote Hospital. In his request for relief, Dr. Fisher sought monetary damages to compensate him for the losses caused by Foote Hospital's discriminatory denial of staff privileges.

In response to cross motions for summary disposition, the trial court dismissed Dr. Fisher's claim for damages on two grounds not addressed by the Court of Appeals. Instead of addressing Dr. Fisher's specific claims of error, the Court of Appeals ruled, in an opinion released for publication, that Dr. Fisher's claim was invalid because no private right of action is available to enforce the anti-discrimination principle set forth in MCL 333.21513(e). This is a matter of grave concern to AOA, MOA, ACOS, as well as the many osteopathic physicians who practice in this state.

A COMPARISON OF OSTEOPATHIC AND ALLOPATHIC MEDICINE AND EDUCATION

There are only two types of physicians in Michigan (and the United States) with *unlimited* license to practice medicine: Osteopathic physicians (D.O.s) (licensed by the Michigan Board of Osteopathic Medicine and Surgery) and allopathic physicians (M.D.s) (licensed by the Michigan Board of Medicine). Although D.O.s and M.D.s are similar in many respects, there are philosophic and therapeutic differences between the two healthcare professions.

Both D.O.s and M.D.s are fully qualified physicians licensed to prescribe medicine and perform surgery in all fifty states. Applicants to both D.O. and M.D. colleges typically have a four-year undergraduate degree; both complete four years of basic and clinical medical education; after medical school, both D.O.s and M.D.s can choose to practice in a primary care or specialty discipline by completing a residency program; both must pass comparable licensing examinations to practice. Yet, aside from these similarities, osteopathic (D.O.) medicine is different from allopathic (M.D.) medicine in certain ways. In particular, D.O.s emphasize a "whole person" approach to medical treatment, focusing on the overall health of their patients, including home and work environments, instead of just treating specific symptoms or illnesses. Moreover, D.O.s also receive extra training in the Neuromusculoskeletal system, which focuses on the ways that an injury or illness in one part of the body can affect another.

Because of these differences, the osteopathic and allopathic medical education programs are parallel but distinctive in their approaches to medical education, residency training, board certification, and licensure systems. As an example, the State of Michigan has established at Michigan State University both a College of Osteopathic Medicine (D.O. degree) and a College of Human Medicine (M.D. degree) as separate but parallel colleges for the education and training of D.O.s and M.D.s. Beyond the basic education received by a D.O. in the study of osteopathic medicine or an M.D. in the study of allopathic medicine, internship and residency programs exist in each discipline to promote further training. Osteopathic (D.O.) residency programs are accredited by the AOA. Allopathic (M.D.) residency programs are accredited by the ACGME. Finally, each discipline has a parallel board certification system in place for specialty practices. Osteopathic (D.O.) specialists receive board certification from the AOA-sponsored boards; allopathic (M.D.) specialists receive board certification from the American Boards. While a

person with a degree as a D.O. could conceivably elect to forsake a postdoctoral osteopathic education, *i.e.,* an AOA-accredited internship and residency, in favor of an allopathic (M.D.) residency, after which he or she would be eligible for certification under the American Boards, such a person would not have a complete education as an osteopathic physician, because completion of an AOA-accredited residency is an integral part of an osteopathic education in that it continues to emphasize the unique osteopathic approach to medical care. Moreover, opportunities within ACGME residency programs did not begin to open up for osteopathic physicians until the 1980s. Again, D.O.s and M.D.s have separate and parallel paths to becoming board-certified specialists.

OSTEOPATHIC MEDICINE IN MICHIGAN

The study and practice of osteopathic medicine has a rich history in the State of Michigan and Michigan residents have traditionally held osteopathic physicians in high esteem. In Michigan, osteopathic physicians comprise approximately 18% of the physician workforce, compared to 6% nationally. Michigan is second only to Pennsylvania in the number of actively practicing osteopathic physicians. See Gevitz, *supra,* pp 171-173. Many osteopathic physicians locate their practice in areas where they serve the poor and underprivileged in our State. Michigan State University's College of Osteopathic Medicine ("MSU-COM"), established in 1969, was the first publicly supported school of osteopathic medicine at a major university. MSU-COM has graduated over 3,300 physicians in its 30+ year history and is currently ranked in the top 10% of all medical schools in the United States (both M.D. and D.O.) by *U.S. News and World Report.*

AOA accredited residency programs of various kinds exist at the following institutions in Michigan: Botsford General Hospital, Farmington Hills, MI; Carson City Hospital, Carson City, MI; Community Health Center Branch, Coldwater, MI; Garden City Hospital Osteopathic,

Garden City, MI; Genesys Regional Medical Center-Health Park, Grand Blanc, MI; Henry Ford/Horizon Health System (Bi-County-Henry Ford-Wyandotte); Ingham Regional Medical Center, Lansing, MI; Marquette General Health System, Marquette, MI; Mercy General Health Partners, Muskegon, MI; Metropolitan Hospital, Grand Rapids, MI; Michigan State University College of Osteopathic Medicine, East Lansing, MI; Mid Michigan Medical Center-Midland, Midland, MI; Mount Clemens General Hospital, Mount Clemens, MI; MSUCOM/Bay Medical Center Div., Bay City, MI; MSUCOM/Munson Medical Center, Traverse City, MI; Oakwood Southshore Medical Center, Trenton, MI; POH Medical Center, Pontiac, MI; Providence Hospital, Southfield, MI; Sparrow (E.W.) Hospital and Health System, Lansing, MI; St. John Oakland Hospital, Madison Heights, MI; St. John-Detroit Riverview Hospital, Detroit, MI; and St. Joseph Mercy Hospital, Pontiac, MI.

DISCRIMINATION AGAINST OSTEOPATHIC PHYSICIANS AND THE MICHIGAN LEGISLATURE'S RESPONSE

Despite the significant role osteopathic physicians play in Michigan, and the fact that the training and education of D.O.s is equivalent to an M.D.s' training and education, D.O.s still remain a decided minority when compared to their allopathic counterparts. Because D.O.s make up only 18% of the physician workforce in Michigan, they are out-numbered more than 4-1 by M.D.s. Unfortunately, as a natural result, D.O.s are sometimes subjected to professional discrimination by the M.D.s that comprise the majority. Typically, the motivation for the discrimination is economic, rather than truly invidious bias, but the effect is equally damaging to D.O.s.

While D.O.s serve as staff physicians in virtually every Michigan hospital, M.D.s constitute the majorities on the hospital committees that promulgate policies such as the one in question here. Given the high stakes involved, this case is of the utmost importance to the AOA,

MOA, ACOC, and the thousands of physicians they represent. Positions on a hospital's medical staff and access to operating rooms and other facilities are essential for a surgical practice. Additionally, the medical staff positions often present economic opportunities for surgeons who can be "on call" to assist with patients admitted to the emergency room. If the Court of Appeals published decision is affirmed, an extremely important piece of legislation that was designed to protect D.O.s from unfair discrimination will have lost its efficacy.

In this case, Foote Hospital's officially stated preference for ACGME-approved training and American Board of Surgery Certification over AOA-approved training and AOBS board certification directly violates the anti-discrimination principle set forth unequivocally in MCL 333.21513(e).[1] Under the official policy of Foote Hospital, American Board certification, *i.e.*, allopathic (M.D.) certification, is required as a threshold qualification for staff privileges in surgery. Unlike its treatment of an M.D. with an ACGME-accredited residency and American Board certification in general surgery, Foote Hospital requires a duly-licensed osteopathic physician with an AOA-accredited residency and AOA-sponsored board certification in general surgery (*i.e.,* osteopathic certification) to prove that "his or her education, training, experience, and competence is equivalent" to the allopathic residency and certification. Moreover, according to Foote Hospital's written policy, a waiver of the American Board certification requirement is only to be granted in "exceptional" cases. Thus, as a matter of official Hospital policy, osteopathic physicians are placed at an automatic and formidable disadvantage as compared to allopathic physicians with comparable education and training. Whereas the sufficiency of *allopathic* training and certification is assumed, the sufficiency of *osteopathic* training and

[1] For purposes of this appeal, discrimination by Foote Hospital should be assumed, since the Court of Appeals holding would bar Dr. Fisher's claim with or without a showing of discrimination. Under the Court of Appeals decision, no matter how egregious the statutory violation, no D.O. would be permitted to bring a claim for compensation.

certification must be established anew in each particular case, and will only be accepted as being the "equivalent" of an ACGME-accredited residency and American Board certification in "exceptional" cases. This policy constitutes blatant discrimination in favor of physicians with allopathic education at the expense of physicians with osteopathic education. It is a disservice to the many physicians serving our State who were educated at Michigan State University and other osteopathic educational institutions and who continued their education in AOA-approved residencies at Michigan hospitals and other institutions, such as those listed above.

Historically, there has been an abuse of "medical quality and training" issues to unfairly exclude osteopathic specialists from medical staffs. The State Legislature sought to alleviate this potential for discrimination against the minority (D.O.s) by the majority (M.D.s) through MCL 333.21513(e), which provides:

> Sec. 21513. The owner, operator, and governing body of a hospital licensed under this article:
>
> * * *
>
> (e) Shall not discriminate because of race, religion, color, national origin, age, or sex in the operation of the hospital, including employment, patient administration and care, room assignment, and professional or nonprofessional selection and training programs, and shall not discriminate in the selection and appointment of individuals to the physician staff of the hospital or its training programs on the basis of licensure or registration or professional education as doctors of medicine, osteopathic medicine and surgery, or podiatry.

By requiring doctors with osteopathic education and certification to meet an additional requirement not imposed upon allopathic doctors with comparable education and certification, Foote Hospital clearly discriminates in the "selection and appointment of individuals to the physician staff" based on a physician's professional education "as a doctor of osteopathic medicine" in violation of the plain language of MCL 333.21513(e). The intent of the Legislature in enacting MCL 333.21513(e) is clear from the plain language of the statute unambiguously

providing that hospitals "shall not" discriminate on the basis of a physician's professional education as an osteopathic physician.

THE COURT OF APPEALS PUBLISHED PER CURIAM OPINION

Addressing an issue that had not been raised in the trial court, the Court of Appeals held, in a published per curiam opinion, that a D.O. discriminated against in violation of MCL 333.21513(e) may not bring an action in court to recover compensation for injuries caused by the hospital's illegal discrimination. (Court of Appeals opinion, slip op pp 2-3.) The Court of Appeals began by relying on *Mack v City of Detroit*, 254 Mich App 498, 501-502; 658 NW2d 492 (2002), that where a legislative code provision does not "expressly create a private cause of action," a civil claim for relief under the statute is "precluded if the code provides an *adequate means of enforcing* its provisions." (Court of Appeals opinion, slip op p 2; emphasis added.) – The Court of Appeals panel's citation to *Mack* was not accurate. Where *Mack* focused on the adequacy of the remedy provided by the statute (*i.e.*, the means by which the *plaintiff* might be vindicated or made whole), see *Mack, supra*, 254 Mich App at 501, the Court of Appeals panel in the instant case focused on the adequacy of the means of enforcement (*i.e.*, the means by which the *defendant* might be compelled to comply with the statute). This shift in focus away from the plaintiff's remedy and onto the defendant's conduct, doomed Dr. Fisher's claim to failure.

Before the Court of Appeals decision in this case, courts assumed that statutes proscribing certain conduct implicitly gave rise to a private right of action for damages where the *remedy* provided by the legislation was "plainly inadequate." See, e.g., *Mack, supra* at 501-502. Now, under the Court of Appeals decision in this case, the nature and efficacy of the statutory relief—if any—available to the plaintiff is wholly irrelevant. What matters under the Court of

Appeals decision is whether the Legislature provided an adequate means of compelling the defendant to obey the law.

Because intentional discrimination against an osteopathic physician in violation of MCL 333.21513(e)—like any other violation of the Public Health Code—can theoretically result in the "limitation, suspension, or revocation of a health facility license, as well as an administrative fine" under MCL 333.20165(1)(b), the Court of Appeals panel concluded that the Legislature had provided adequate means of enforcement. This means of enforcement is of little value to an individual D.O. who will suffer irreparable economic loss and damage to reputation by discriminatory conduct of this kind. The Court of Appeals also relied on the facts (1) that director of the department of health can ask the attorney general or a prosecuting attorney to seek to enjoin violations, see MCL 333.20177, and (2) that violation of the Public Health Code is a misdemeanor, see MCL 333.20199. Although stated in terms of the adequacy of the "remedy," the Court of Appeals analysis actually focused only on the consequences to an offending hospital. There was no discussion of the relief the statute affords to D.O.s and whether there is realistic access to and a possibility of such relief for aggrieved osteopathic physicians, such as Dr. Fisher. In sum, because the Court of Appeals analysis never even considered whether the Legislature provided an adequate *remedy*—or any remedy for that matter—to plaintiff, it failed to properly apply the proper test for determining the existence of a private right of action.

A second fundamental problem with the Court of Appeals published per curiam opinion was its failure to address—or to even recognize—a second reason why Dr. Fisher may maintain a cause of action to recover compensation for injuries caused by Foote Hospital's illegal discrimination. Under Michigan Supreme Court precedent that dates back to at least 1890,[2] a

[2]See *Ferguson v Gies*, 82 Mich 358, 365; 46 NW 718 (1890).

private action may be maintained to recover damages for the violation of a statute where the statute in question imposes a duty for the benefit of particular individuals or classes of individuals as opposed to establishing only a public remedy. See, e.g., *Bolden v Grand Rapids Operating Corp*, 239 Mich 318, 327; 214 NW 241 (1927), quoting 1 C.J. p 957. Dr. Fisher's case against Foote Hospital clearly falls within this rule.

THE RIGHT TO BRING A PRIVATE CAUSE OF ACTION TO REMEDY A STATUTORY VIOLATION

In Michigan, it is well-settled that a private cause of action may be maintained for violation of a statutory provision where the sole legislative "remedy," if any, is "plainly inadequate." E.g., *Pompey v General Motors*, 385 Mich 537, 553 n 14; 189 NW2d 243 (1971); *Mack, supra*, 254 Mich App at 501. As noted above, the Court of Appeals panel in this case wrongly changed the focus away from the adequacy of the plaintiff's remedy and onto the existence of some plausible means of compelling the defendant's compliance.

More problematic than the Court of Appeals' failure to properly apply the "remedy" test, however, was its failure to recognize an even more fundamental reason why Dr. Fisher's private action against Foote Hospital should have been allowed to proceed: The statute in question, MCL 333.21513(e), imposes a duty for the benefit of particular individuals or classes of individuals (osteopathic physicians) as opposed to establishing only a public remedy. Under longstanding precedent of this Court, a violation of this kind of statute gives rise to a private cause of action for damages. This principle is aptly demonstrated by the following cases.

***Ferguson v Gies*, 82 Mich 358; 46 NW 718 (1890):** In *Ferguson, supra*, this Court held that an African American person who was the victim of discrimination in violation of Michigan's 1885 civil rights act was entitled to recover compensatory damages despite the fact that the 1885 civil rights act did not expressly set forth the right to a civil damages remedy. The 1885 civil

rights act declared that all persons within the state were entitled to equal accommodations in restaurants. *Id.* at 364, citing 1885 PA 130. A violation of the act was a misdemeanor. *Id.* The *Ferguson* case involved an African American who was denied equal service in a restaurant. The plaintiff sought to recover compensatory damages for his injury based on the restaurant owner's violation of the 1885 civil rights act. The defendant restaurant owner argued that the 1885 civil rights act did not provide a basis for a private remedy because, by its terms, it was solely a penal statute. *Id.* at 365.

This Court rejected the defendant's argument and allowed the plaintiff's claim for damages to proceed. This Court based its decision on the "general rule" that "where a statute imposes upon any person a specific duty for the protection or benefit of others," a person who "neglects or refuses to perform such duty" is "liable for any injury or detriment caused by such neglect or refusal, if such injury is the kind which the statute was intended to prevent." *Id.* Because the plaintiff established a violation of the statute, this Court held that he was entitled to recover damages despite the absence of a specific provision spelling out the right to sue for civil damages.

The same conclusion is required here. Like the 1885 civil rights act, MCL 333.21513(e) prohibits discrimination against specific groups, but does not expressly establish the right to recover compensatory damages. Also like the 1885 civil rights act, a violation of MCL 333.21513(e) is punishable as a misdemeanor. Because an obvious purpose of MCL 333.21513(e) is to prevent discrimination "on the basis of licensure or registration or professional education" as a doctor of "medicine, osteopathic medicine and surgery, or podiatry"—and thereby protect osteopathic physicians such as Dr. Fisher—Dr. Fisher's claim falls squarely within the holding *Ferguson*.

One might attempt to distinguish *Ferguson* on the ground that the *Ferguson* Court *also* described the 1885 civil rights law as being "declarative of the common law," which MCL 333.21513(e) is not. *Id.* That fact, however, is not controlling. Two subsequent Michigan Supreme Court decisions expressly rejected the notion that the existence of a pre-existing common law remedy is a necessary prerequisite for a private cause of action. See *Pompey*, *supra* at 556 (citing *Bolden*, *supra* for the proposition that "despite the absence of any pre-existent common-law remedy, the fact that a civil rights statute does not specifically give the person aggrieved a right to damages for the injury suffered does not preclude maintenance of the civil damage action"); see also *Bolden*, *supra*.

***Bolden v Grand Rapids Operating Corp*, 239 Mich 318; 214 NW 241 (1927):** Thirty-seven years after *Ferguson*, this Court addressed a similar issue in *Bolden*. There, the plaintiff alleged that he had been discriminated against when he was denied the privilege of buying a ticket entitling him to a seat on the first floor of a theater. Like the plaintiff in *Ferguson*, the plaintiff in *Bolden* sought to recover compensatory damages based on the defendant theater's violation of the 1885 civil rights act, as amended in 1919. The theater argued that its misdemeanor did not give the plaintiff a private right of action to recover civil damages. It sought to distinguish *Ferguson* on the ground that the plaintiff's claim could not have been brought at common law. This Court, not persuaded by the plaintiff's attempt to distinguish *Ferguson*, explained that the absence of a pre-existing common law right was not fatal where the penal statute at issue required "an act to be done or abstained from by one person for the benefit of another." *Bolden*, *supra* at 326, quoting *Sterling v Union Carbide Co*, 142 Mich 284, 287; 105 NW 755 (1905).

Accordingly, when determining whether a private right to recover civil damages arises from a statutory violation, one must determine whether the statute was intended to benefit the public as a whole, or to benefit certain individuals in particular:

> The nature of the duty and the benefits to be accomplished through its performance must generally determine whether it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty imposed wholly or in part for their especial benefit. [*Bolden*, *supra* at 326, quoting *Taylor v Railroad Co*, 45 Mich 74; 7 NW 728 (1881).]

The Court then explained that a private remedy flows from a statute conferring a personal benefit, adopting as its own the rule stated in 1 C.J. at p 927:

> The true rule is said to be that the question should be determined by a construction of the provisions of the particular statute, and according to whether it appears that the duty imposed is merely for the benefit of the public, and the fine or penalty a means of enforcing his duty and punishing a breach thereof, or whether the duty imposed is also for the benefit of particular individuals or classes of individuals. If the case falls within the first class the public remedy by fine or penalty is exclusive, but if the case falls within the second class a private action may be maintained; particularly where the injured party is not entitled, or exclusively entitled, to the penalty imposed. [*Bolden*, *supra* at 327, quoting 1 C.J. p 127.]

Specifically, the Court held that civil rights statutes (*i.e.*, statutes proscribing discrimination against a particular group of individuals) fall within the later class of statutes that give rise to a civil damages remedy:

> In cases where there has been illegal discrimination the person aggrieved has clearly a civil right of action for damages, and this is true although the provision for the enforcement of a civil rights statute under which the complainant claims redress provides only for a criminal prosecution only. [*Bolden*, *supra* at 328, quoting 5 R.C.L. p 604.]

This Court's holding in *Bolden* remains the law today. Its holding was expressly reaffirmed in 1971. See *Pompey*, *supra*, 385 Mich at 556.

Dr. Fisher's claim falls squarely within the rule of *Bolden* because MCL 333.21513(e) makes it illegal to discriminate against osteopathic physicians in the granting of hospital

privileges. As the osteopathic physician aggrieved by such illegal discrimination, Dr. Fisher is entitled to bring a civil action for damages. *Bolden*, *supra* at 327-328.

***St John v General Motors Corp*, 308 Mich 333; 13 NW2d 840 (1944):** In the *St John* case, this Court applied the *Bolden* rule to a claim by a female employee who sought to recover damages for General Motors' violation of a statute that made it a misdemeanor for employers to "'discriminate in any way in the payment of wages as between the sexes,'" but did not expressly create a private right of action for damages. *Id.* at 335, quoting 1931 PA 328. This Court, relying directly on *Bolden*, held that "[I]f plaintiff has suffered financial damage by reason of defendant's noncompliance with the mandatory provisions of the statute applicable to claimants' employment then civil action may be maintained." *St. John*, *supra* at 336.

***Pompey v General Motors*, 385 Mich 537; 189 NW2d 243 (1971):** In the *Pompey* case, an African American employee alleged that he suffered racial discrimination in his employment in violation of the Fair Employment Practices Act ("FEPA"), which created a statutory remedy enforceable by the state Civil Rights Commission ("CRC"). The plaintiff was barred from recovery under the statutory remedy because he failed to file a complaint within the 90-day limitation period. *Id.* at 550-551. Additionally, there was no pre-existing common law remedy for discrimination in employment. *Id.* at 552. Nevertheless, this Court held that the plaintiff could pursue an action for civil damages, in court, based upon the defendant's alleged violation of FEPA's anti-discrimination provision.

The *Pompey* Court began its analysis of the private cause of action question by noting the general rule "that where a new right is created or a new duty is imposed by statute, the remedy provided for enforcement of that right by the statute for its violation and nonperformance is exclusive. *Id.* The Court then noted that "courts have forged exceptions to these general rules

when the statutory rights infringed were civil rights." *Id.* at 553. In such cases, "a person aggrieved by the violation of a civil rights statute is entitled to pursue a remedy which will effectively reimburse him for or relieve him from violation of the statute, notwithstanding the statute did not expressly give him such a right or remedy." *Id.* In support of this holding, the *Pompey* Court relied directly on this Court's earlier holdings in *Ferguson*, *Bolden*, and *St. John* and the reasoning employed in reaching those earlier decisions. See *Pompey*, *supra* at 553-559.

The *Pompey* Court expressly endorsed the rule that an important dichotomy exists between statutes promoting the general public good and statutes designed to protect certain individuals or classes of individuals from discrimination or other mistreatment (*i.e.* civil rights statutes). See *id.* at 556, quoting *Bolden, supra* at 328. Under the rule recognized in *Ferguson*, *Bolden*, *St. John*, and *Pompey*, a violation of civil rights statutes may be remedied by a private action for civil damages, even where no private right of action is expressly set forth within the legislative act in question. Although MCL 333.21513(e) may not be viewed as a traditional "civil rights" statute, it nevertheless *protects specific classes of individuals from discrimination* and is thus a civil rights statute for purposes of the rule of *Ferguson*, *Bolden*, *St. John*, and *Pompey*. None of those cases attempted to describe which particular groups may be protected by "civil rights" statutes. Instead, those cases described all statutes designed to protect certain individuals or groups of individuals as "civil rights" statutes. By definition, statutes designed to protect or benefit certain individuals or groups necessarily create "civil rights" in those protected or benefited. MCL 333.21513(e) is a "civil rights" statute precisely because it bestows upon osteopathic physicians the "civil right" to be free from professional discrimination by hospitals.

***Holmes v Haughton Elevator Co*, 404 Mich 36; 272 NW2d 550 (1978):** In the *Holmes* case, this Court applied the *Pompey* rule to an age discrimination claim based on FEPA. This

Court explained that "[t]here is nothing in our decision in *Pompey* which suggests that the holding is to be limited to the securing of one's civil right to be free from racial discrimination in private employment." *Id.* at 42. Recognizing that the right "to be free from racial discrimination and the right to be free from age discrimination in private employment are both statutory civil rights," the *Holmes* Court opined that "*Pompey* does not permit, and we do not perceive, a basis that prompts us to accord age discrimination lesser treatment." *Id.* at 43.

The key factor in the analysis of each of the cases described above was the nature of the statute at issue. Statutes creating civil rights for the benefit of certain individuals (*i.e.*, statutes that provided a special protection or benefit to a certain identifiable group of individuals) are deemed to give rise to a civil damages remedy. In contrast, statutes conferring only a general public benefit do not. Because MCL 333.21513(e) protects certain classes of individuals (including D.O.s) from professional discrimination, it is a "civil rights" statute for purposes of the *Bolden-Pompey* line of cases and, as such, provides a valid basis for the recovery of a civil damages remedy. In this regard, it is significant to note that the statutory prohibition against discrimination on the basis of licensure as a D.O. in Section 21513 is placed in the same Subsection—Subsection (l)—as is the prohibition of discrimination on the basis of "race, religion, color, national origin, age or sex." This placement further indicates the legislature's intent that D.O.s be treated as a class with "civil rights."

Foreign Authority. Not only would a decision reversing the Court of Appeals in this case bring Michigan law back in line with the longstanding principles set forth in the *Bolden-Pompey* line of cases, but it would also be consistent the approach taken by the highest appellate court in the State of New York, which addressed a similar claim involving a D.O. alleging professional discrimination by a hospital. In *Fritz v Huntington Hospital*, 39 NY2d 339; 348

NE2d 547 (NY Ct App, 1976), the New York Court of Appeals, addressed a claim similar to Dr. Fisher's that was made under New York Public Health Law § 2801-b.

In reversing a lower court decision favoring the hospital, the New York Court of Appeals explained (1) that, as a matter of New York law, osteopathic physicians are licensed and entitled to be treated in the same manner as other licensed physicians, see *Fritz, supra* at 344, (2) that the statute regulating hospital staffing decisions could, by its terms, be applied to a private hospital, see *Fritz, supra* at 345, (3) that a state statute regulating the staffing decisions of a private hospital may be enforced through a civil claim brought by the party most directly injured by the statutory violation, see *Fritz, supra* at 346, and (4) that denying staff privileges based on osteopathic training, without consideration of the applicants' actual credentials and capabilities, was in violation of a state statute prohibiting discrimination on grounds unrelated to patient care, the objectives of the institution, or the character and competency of the applicant, see *Fritz, supra* at 346-348.

The *Fritz* case stands for the proposition that actions of a private hospital may be made subject to state regulation where a specific state statute expressly proscribes limitations on the hospital's conduct. While the staffing decisions of a private hospital outside the scope of any statute may be beyond judicial review, there is absolutely no authority for the proposition that a state lacks the police power to regulate staffing decisions to the extent deemed necessary. *Id.* at 345. The *Fritz* decision also recognized that osteopathic (D.O.) training versus allopathic (M.D.) training does not provide a valid basis for assessing the effect a staffing decision would have on patient care and patient welfare. *Id.* at 346-348.

Most importantly, for purposes of the issue now before this Court, *Fritz* stands for the proposition that a D.O. directly injured by a hospital's discriminatory staffing decisions has

standing to seek relief in a court of law, despite the fact that the only means of enforcement specifically set forth in the statute itself was the right of the state attorney general to seek an injunction:

> [W]e hold . . . that where the Legislature has enacted a statute which envisages the enforcement of rights thereunder but does not explicitly set forth who shall have standing to maintain enforcement proceedings, that a party suffering in jury in fact and arguably falling within the zone of interest to be protected by the statute has standing to sue. [*Id.* at 346]

The *Fritz* Court also observed that "no legal impediment exists which would bar petitioners from seeking relief in the courts and, indeed, neither reason nor logic ought prevent them from access thereto for correction of an aggrievement proscribed by law and a violation, or threatened violation, of section 2801-b." This reasoning is consistent with the Michigan view that a party injured by the violation of a "civil rights" statute (*i.e.*, a statute enacted for the protection or benefit of a specific class of individuals, such as statute proscribing discrimination in employment) may maintain a private cause of action without express statutory authorization. See *Pompey*, *supra* at 554-557.

CONCLUSION

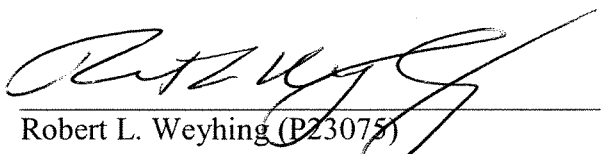
This Court, in *Bolden*, set forth the rule that if a statutory provision "is merely for the benefit of the public" in general, then "the public remedy by fine or penalty is exclusive," but if the statutory provision imposes a duty "for the benefit of particular individuals or classes of individuals," then "a private action may be maintained"—especially "where the injured party is not entitled, or exclusively entitled, to the penalty imposed." *Bolden*, *supra* at 327, quoting 1 C.J. p 127; see also *Pompey, supra* at 556-557, reaffirming the *Bolden* rule. Dr. Fisher's claim against Foote Hospital, based on MCL 333.21513(e), falls into the second category, because the statute is specifically intended to protect certain individuals from discrimination. Under the *Bolden-Pompey* line of cases, the benefit or protection established by MCL 333.21513(e)—*i.e.*,

the "civil right" at issue—may be enforced by a private cause of action for compensatory damages.

Notably, the *published* Court of Appeals decision in this case reached a contrary result, denying Dr. Fisher's right to recover damages for Foote Hospital's violation of the anti-discrimination rule set forth in MCL 333.21513(e), without even considering the effect of the *Bolden-Pompey* line of cases. A published Court of Appeals case that contradicts existing Michigan Supreme Court precedent is a serious problem that should be corrected to avoid confusion. See MCR 7.302(B)(3) & (5). Even more important to the AOA, MOA, and ACOS, is the ability of the thousands of D.O.s who practice in Michigan to rely on MCL 333.21513(e) to prevent discrimination. If the Court of Appeals published decision is affirmed, D.O.s will be denied the ability to be compensated for illegal discrimination by hospitals. Accordingly, the AOA , MOA, and ACOS strongly urge this Court to REVERSE and REMAND for further proceedings.

Respectfully submitted,

CLARK HILL PLC

By: 

Robert L. Weyhing (P23075)
Paul C. Smith (P55608)
500 Woodward Avenue, Suite 3500
Detroit, Michigan 48226-3435
(313) 965-8300
Attorneys for *amicus curiae* Michigan Osteopathic Association, American College of Osteopathic Surgeons, and American Osteopathic Association

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